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State v. Bailey Appellant's Reply Brief Dckt. 42622

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. BRIAN P. BAILEY Defendant/Appellant.	)	APPELLANT'S REPLY BRIEF SUPREME COURT NO. 42622 CR-13-0013294

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE BENJAMIN SIMPSON
District Judge

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I. Whether the state can proceed to lay foundation for the introduction of breath test results pursuant to I.C. § 18-8004(c) where the Idaho State Police have not adopted a method.

II. Whether there is an exception to the warrant requirement for breath testing in DUI investigations.

ARGUMENT

I.

The state argues in its response that the defendant failed to recognize that the Idaho Supreme Court ruled in *State v. Dunlap*, 155 Idaho 345, 381-82 (2013) as to the proper review for denials of requests for funding. The defendant concedes this is the case.

Moreover, the defendant is also aware that pursuant to *State v. Tomlinson*, 159 Idaho 112 (Ct.App.2015), the issues for which he had requested an expert have ceased to be relevant. Pursuant to *Tomlinson*, a DUI prosecution for having a blood/alcohol level of 0.08 or higher is actually a prosecution for having a blood/alcohol level of 0.08 or higher according to a machine selected, maintained, and operated by the Idaho State Police. While the defense has serious doubts as to the constitutional validity of a law that purports to impose a loss of liberty on citizens for the readings on a machine that have been uncoupled from physical reality, as the reading is not rationally related to the government's purported purpose of preventing drunk driving since it has no bearing on the real world, the defendant must concede he did not foresee this development in the law and cannot raise a challenge now in a reply brief on appeal.

Thus, the defense must reluctantly withdraw this issue.

II.

As the state points out, the Idaho Supreme Court issued its decisions in *State v. Haynes*, 159 Idaho 36, 355 P.3d 1266 (2015) and *State v. Riendeau*, 159 Idaho 52, 355 P.3d 1282 (2015), shortly after the defendant filed his briefing in this matter. The state argues that this Court lacks

jurisdiction in a criminal case to determine the validity of the Standard Operating Procedures for breath testing under the Idaho Administrative Procedures Act.

The state continues to misunderstand the issue presented. I.C. 18-8004(4) permits the Idaho State Police to create a method that operates as a legal foundation at a criminal trial. Because such a method would be a rule as defined by IDAPA, it must be promulgated according to IDAPA. *See generally Haynes, Riendeau.* Since the Standard Operating Procedure offered by the state had not been properly promulgated, the trial court could not admit evidence of the breath testing in this matter pursuant to I.C. 18-8004(4). The trial court had to require the state to present the evidence through a forensic expert. *Id.* The state, after all, did not claim at any point that the Standard Operating Procedures *had* been properly adopted. *See Haynes*, 355 P.3d at 1275. In fact, it did not agree that they were rules. *Id.* at 1274. Thus, the state's insistence that to void the Standard Operating Procedures requires this Court to consider I.C. §§ 67-5271, *et seq.* misses the point- the problem is that the state has no method it can offer as required by I.C. § 18-8004(4), because it would need to show that said method was properly promulgated pursuant to IDAPA. It cannot, thus its attempt to be permitted to so proceed fails.

Moreover, if the state is of the opinion that the legislature can displace the judicial branch and place the power to determine whether evidence is admitted in the hands of the executive, then it should review not only Article II § 1 and Article V § 13 of the Idaho Constitution, but Article I § 13 and the Fourteenth Amendment to the United States Constitution. A judge who will not "hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Tumey v. State of Ohio*, 273 U.S. 510, 531 (1927). It is impossible for the

judiciary to provide Due Process of law where the executive controls its powers.

III.

The state argues that the Idaho Supreme Court held that consent to a breath test is not required when an officer has probable cause to believe someone has driven under the influence because a warrant is not required. Brief of Respondent at 21 *citing Haynes*, 355 P.3d at 1275-76. That ruling, however, is incorrect. The Court places too much weight on the minimal intrusion of the breath testing procedure as a reason to forego the warrant requirement. *See Haynes*, 355 P.3d at 1276. For there to be an exception to the warrant requirement, the United States Supreme Court has required that the state show reasons why getting a warrant would be impractical or unnecessary to further the aims of the warrant requirement. *Missouri v. McNeely*, __ U.S. __, 133 S.Ct. 1552, 1558 (2013); *Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 619-20, 622 (1989). The United States Supreme Court reviewed the circumstances of a DUI investigation and found no reason to create an exception to the warrant requirement. *McNeely*, 133 S.Ct. at 1568. Thus, a warrant was required, and this Court should so find.

DATED this 18 day of December, 2015.

OFFICE OF THE KOOTENAI
COUNTY PUBLIC DEFENDER

BY: _____
JAY LOGSDON, ISB 8759
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that I have this 22 day of December, 2015, served a true and correct copy of the attached APPELLANT'S REPLY BRIEF via interoffice mail or as otherwise indicated upon the parties as follows:

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